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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CHARLES RIVER CIVIC TELEVISION, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., BOSTON BROADCASTERS, INC., WHDH, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles River Civic Television, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 13, 1970.

OPINIONS BELOW

The opinion of the court below has not yet been reported. This opinion is found at pp. 1a-43a of the appendices filed with this Court by WHDH, Inc. in

No. 1622–October Term 1970 ("WHDH Appendices") in connection with its petition seeking a writ of certiorari filed April 23, 1971.[1] The opinion of the court below denying WHDH, Inc.'s motion requesting that the proceedings be remanded to the Commission (WHDH Appendices, Appendix H) also has not yet been reported.

FCC Decisions: The FCC decisions which were the subject of review by the court below consist of a decision of the Commission adopted January 22, 1969 reported at 16 FCC 2d 1 (WHDH Appendices, pp. 52a-79a) and a decision of the Commission denying reconsideration of that opinion reported at 17 FCC 2d 856 (1969) (WHDH Appendices, pp. 306a-325a). The Initial Decision of the Hearing Examiner is reported at 16 FCC 2d 29 (1966) (WHDH Appendices, pp. 80a-305a).

JURISDICTION

The judgment of the court below (WHDH Appendices at 44a) was entered on November 13, 1970. Petitions for rehearing filed by various parties to the proceedings below were denied on February 16, 1971 (WHDH Appendices, pp. 44a-46a). A motion to remand the case to the Commission filed by WHDH, Inc. on the basis of newly discovered evidence was denied on April 15, 1971 (WHDH Appendices, Appendix H). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) and 47 U.S.C. § 402(j).

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[1] The WHDH Appendices consist of appendices lettered A-G which are consecutively paginated and are bound separately from WHDH, Inc.'s petition and Appendix H which is bound with WHDH, Inc.'s petition.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that a decision of the FCC choosing between two competing applicants for a commercial television facility was legally valid where only three of seven Commissioners participated in and voted upon the choice between the applicants and only two of the Commissioners participating and voting provided a rationale for their choice.

2. Whether the court below erred in affirming the FCC's choice between two competing applicants for a commercial television facility where that choice was largely based upon the preferred applicant's representations concerning the extent to which its ownership would be integrated with management whereas the facts in the record clearly showed that the preferred applicant's representations could not be relied upon.

STATUTES AND FCC RULES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*), of the Administrative Procedure Act, as amended (5 U.S.C. §§ 551 *et seq.*) and of the Rules and Regulations of the Federal Communications Commission are set forth in the Supplemental Appendix hereto, *infra.*

STATEMENT

This case involves applications for authority to operate a commercial VHF television broadcasting station on Channel 5 in Boston, Massachusetts. The history of this proceeding covers a span of 17 years and is quite complex. The present phase of the proceeding, culminating in the decision for which review is sought

in this petition, began in 1963 when the Commission designated for comparative hearing the renewal application of WHDH, Inc. ("WHDH"), the then operator of the facility, and the applications for the same facilities filed by Charles River Civic Television, Inc. ("Charles River"), Boston Broadcasters, Inc. ("BBI") and Greater Boston TV Co., Inc. ("Greater Boston II").[2] In order to place the present phase of the proceedings in perspective, however, it is necessary to understand the background of the case.

I. BACKGROUND

In an earlier phase of the proceeding, begun in 1954, involving WHDH and other applicants for initial authority to operate on Channel 5, the Commission awarded the grant to WHDH. Upon appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for further hearings on alleged *ex parte* contacts made by Robert B. Choate, a principal of WHDH. *Massachusetts Bay Telecasters, Inc.* v. *FCC,* 104 U.S. App. D.C. 226, 261 F.2d 55 (1958). The court of appeals retained jurisdiction. After a hearing, the Commission found that *ex parte* contacts had indeed occurred, and upon the Commission's request, the court of appeals remanded the entire proceeding to the Commission to permit a new evaluation of all the applicants. *Massachusetts Bay Telecasters, Inc.* v. *FCC,* 111 U.S. App. D.C. 144, 295 F.2d 131, *cert. den.,* 366 U.S. 918

[2] Greater Boston II is, in essence, the alter-ego of Greater Boston Television Corporation, an applicant which competed with WHDH for an initial license in an earlier phase of the proceeding, with the majority of the stock in Greater Boston II being owned by persons who hold a majority of the stock in Greater Boston Television Corporation.

(1961). Upon reevaluation, the Commission reaffirmed its 1957 grant to WHDH, but limited WHDH to a four-month license. *WHDH, Inc., et al.,* 33 FCC 449.

Both WHDH and a competing applicant again appealed from this decision, but before any final decision could be rendered by the court of appeals, Mr. Choate died and the court remanded the case to the Commission to permit a reevaluation of the applicants in light of this change in circumstances. *Greater Boston Television Corp.* v. *FCC,* 118 U.S. App. D.C. 162, 334 F.2d 552 (1964). In the interim, the Commission had issued an order permitting new applicants to file for Channel 5. *WHDH, Inc., et al.,* 25 Pike & Fischer, R.R. 80 (1962). Charles River, BBI and Greater Boston II filed applications in competition with the pending renewal application of WHDH. In response to the court of appeal's remand in *Greater Boston Television Corp., supra,* the Commission consolidated the proceedings in the original case with those in the second proceeding, in which WHDH's renewal application was to compete with the initial applications of Charles River, BBI and Greater Boston II, but only for the narrow purpose of considering the effect of Mr. Choate's death on the WHDH application.

II. THE PRESENT PHASE OF THE PROCEEDING

The Hearing Examiner's Initial Decision in the consolidated proceeding was issued in 1966 after a comparative hearing. *WHDH, Inc., et al.,* 16 FCC 2d 29 (1966) (WHDH Appendices, pp. 80a-305a). The Examiner proposed a full three-year renewal for WHDH and denial of the competing applications. On January 22, 1969, the Commission adopted a decision

accepting most of the Examiner's findings of fact, but reversing his ultimate determination and granting the application of BBI. 16 FCC 2d 1 (1969) (WHDH Appendices, pp. 52a-79a). In a Memorandum Opinion and Order of May 19, 1969, 17 FCC 2d 856 (1969) (WHDH Appendices, pp. 306a-325a), the Commission denied reconsideration of the January, 1969 decision.

The Commission's decision of January, 1969 awarding a construction permit to BBI and denying the competing applications is relatively brief and relies primarily on an analysis of the applicant's showing under the standard comparative criteria. The criteria are delineated in the Commission's *Policy Statement on Comparative Broadcast Hearings* ("Policy Statement"), 1 FCC 2d 393 (1965) (WHDH Appendices, pp. 373a-382a).

The following is a brief summary of the Commission's decision.

a. Past Broadcast Record

None of the applicants was awarded a preference for past broadcast record. The Commission declined to award WHDH any preference on the basis of its past record, finding that record to be only average and accordingly not entitled to any weight under the *Policy Statement.* Apart from WHDH, Charles River was the only other applicant with a past broadcast record. Theodore Jones, Charles River's president and a director and stockholder, is also the president, a director and majority stockholder of Charles River Broadcasting Co., Inc., the licensee of WCRB-AM and FM, in Waltham, Massachusetts, a suburb of Boston. Although the Commission adopted the Ex-

aminer's findings that WCRB's record in its specialty was "excellent", the Commission found that Mr. Jones' past broadcast record was not sufficiently unusual to merit consideration in the evaluation of the applicants. 16 FCC 2d at 11 (WHDH Appendices at 62a).

b. Diversity of Ownership of Mass Communications Media

The Commission assessed a substantial comparative demerit against WHDH in view of its ties to the Boston Herald-Travel Corp. which publishes two daily newspapers and a Sunday newspaper in Boston, owns an AM and FM station in Boston and has links to certain CATV facilities. Because of Charles River's ties through Mr. Jones to WCRB, the Commission found that BBI, with no ties to local mass media, was entitled to a slight preference over Charles River, even though Charles River's local interests were "trivial by comparison" with WHDH. 16 FCC 2d at 13 (WHDH Appendices at 64a).

c. Integration of Ownership and Management

The Commission concluded that BBI and Charles River were substantially superior to WHDH in the area of integration of ownership with management. The Commission also determined that as between BBI and Charles River, BBI merited a "significant preference." Although finding that BBI and Charles River were indistinguishable in the matter of broadcast experience and local residence (both being qualitative factors bearing on the integration criterion), the Commission noted that the critically important distinction was the degree to which individuals with ownership interests would play a distinguishable role in the day-to-day operation of the proposed station. Charles

River was given credit for the full-time integration of Mr. Jones as general manager of the proposed station. BBI was preferred on the integration factor, however, because six of its stockholders proposed to work full-time at the station. BBI was also found to be qualitatively superior to Charles River because of the background and experience of its integrated principals. The Commission found further that neither Charles River nor BBI should receive more than slight credit for the proposed integration of owners on a part-time basis. 16 FCC 2d at 13-14 (WHDH Appendices at 64a-65a).

d. Program Proposals

Although slight demerits were assessed against both Charles River and BBI in the area of their programming proposals, the Commission's ultimate conclusion on this aspect of the comparison was that none of the applicants merited a preference over the others for program service. The Commission found that both Charles River and BBI had presented acceptable programming proposals and that neither proposal was so superior to the other as to warrant a preference. Charles River's slight demerit arose from the fact that the Charles River Civic Foundation, a tax-exempt charitable organization, would eventually own all of the stock of Charles River and that restrictions imposed by the Internal Revenue Code would bar Charles River from editorializing on legislative matters. BBI's demerit was based on its proposal to devote 36.3% of its scheduled program time to local live programs, as compared with Charles River's 28.5% proposal and WHDH's past performance of 22%. The Commission concluded, as had the Examiner, that since BBI had been unable to substantiate the feasibility of presenting

such an unusually high percentage of local programming, BBI should receive a slight demerit since the "suspicion arises that BBI's percentage figure 'was flashed for its supposed value in comparison.'" 16 FCC 2d at 16 (WHDH Appendices at 67a). However, this suspicion was in effect segregated from an evaluation of the BBI program proposal itself and accorded limited weight.

e. Other Factors

Finally, the Commission assessed a demerit against WHDH for its failure to file an application for consent to transfer of control upon the *seriatim* accession to the presidency of the Boston Herald-Traveler Corp. of certain individuals. 16 FCC 2d at 17-19 (WHDH Appendices at 68a-70a). Greater Boston II was excluded from the comparative evaluation for its failure to meet certain preliminary disqualifying issues. 16 FCC 2d at 7 (WHDH Appendices at 58a).

In sum, because it had found BBI to be superior to the other applicants on the diversification and integration criteria, the Commission concluded that the public interest would best be served by a grant of its application. Two Commissioners voted for the grant to BBI (Wadsworth and Bartley), and one (Johnson) concurred in the denial of WHDH's renewal application and the grant to BBI, expressing no preference as between Charles River and BBI. Chairman Hyde abstained from voting, Commissioner Cox did not participate and Commissioner H. Rex Lee was absent. Commissioner Robert E. Lee dissented to the denial of WHDH's renewal application.

Each of the parties filed a petition for reconsideration, alleging error in various aspects of the Commis-

sion's decision. In a Memorandum Opinion and Order released on May 19, 1969, *WHDH, Inc., et al.*, 17 FCC 2d 856 (WHDH Appendices, pp. 306a-324a), the Commission denied in all substantial respects these petitions and reaffirmed its original determination.

III. ACTION OF THE COURT BELOW

Charles River, WHDH and Greater Boston II each appealed the Commission's grant to BBI to the court below. In its appeal, Charles River argued that the grant to BBI was invalid since only three of seven Commissioners had participated in and voted upon the choice between Charles River and BBI and since only two Commissioners provided a rationale for their selection of BBI instead of Charles River. In addition, Charles River argued that the Commission erred in basing its grant to BBI in large part on a presumption drawn from BBI's representations in its application as to one aspect of its proposed operations when the Commission had itself found BBI's representations in another aspect of its application to be unreliable. On November 13, 1970, the court below issued an opinion (WHDH Appendices, pp. 1a-43a) rejecting the arguments of Charles River and the other appellants and affirming the Commission's grant to BBI.

Petitions for rehearing were filed with the court below by WHDH and Greater Boston II. These petitions were denied on February 16, 1971 (WHDH Appendices, pp. 44a-46a).

REASONS FOR GRANTING THE WRIT

This case involves fundamental questions concerning the integrity of the decision making process of the Federal Communications Commission which have never

before been passed upon by this Court. It is particularily important that the questions raised be answered by this Court since the answers bear not only upon the decision making processes of the Federal Communications Commission, but also upon the processes of the numerous other federal administrative agencies whose jurisdictions and responsibilities pervade many facets of contemporary American life.

A.

Charles River argued in the court below that the Commission's decision granting BBI's application was procedurally defective for two reasons. First, a quorum of the Commission did not participate in the choice between Charles River and BBI. Second, even if a quorum did participate, a majority of the quorum did not join in the rationale for granting BBI's application. The essence of the two arguments is summarized below.

Section 4(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(h), provides that four Commissioners constitute a quorum. Only five Commissioners heard oral argument in this case. Chairman Hyde, who heard oral argument, abstained from voting because of his participation in phases of the proceeding which predated the comparative evaluation of applicants that was then before the Commission for review. Of the four Commissioners who participated and voted in the proceeding, three decided that the WHDH renewal application should not be granted. Commissioner Robert E. Lee dissented from this determination. Having eliminated WHDH from consideration, the Commission still was faced with the necessity of determining whether Charles River or

BBI was better qualified to operate Channel 5 in Boston. As only three of the Commissioners participated in this aspect of the case, the quorum of the Commission necessary for a legally valid choice between BBI and Charles River did not exist.

The court below recognized that the choice between Charles River and BBI was separate from the Commission's decision as to whether or not WHDH's renewal application should be granted and that only three Commissioners participated in this choice. (WHDH Appendices at 39a). Nevertheless, the court below disposed of Charles River's argument, simply by holding that "assuming a quorum of four or more" the Commission may act "by the majority vote of those present." *Id.* By *assuming* the existence of a quorum, the court below failed to address the fundamental issue posed by Charles River in its appeal, *i.e.*, whether the requisite quorum of four Commissioners can be found on the basis of mere physical presence or whether participation of four Commissioners in the deliberative process is what is required. Charles River submits that it was error for the court below to assume the existence of a quorum from the physical presence of four Commissioners, particularly in view of the fact that the court itself recognized that fewer than four of the Commissioners present actually participated in the decision.

Even assuming a valid quorum had participated in the decision, the decision to grant BBI's application should have been reversed by the court below since a majority of the assumed quorum did not agree on a rationale for the action taken. The Commission's opinion supporting the grant to BBI was joined in by only Commissioners Bartley and Wadsworth. Commissioner

Johnson issued a separate opinion in which he concurred in the result, primarily because the majority voted to deny WHDH's renewal application and because his vote was necessary for a working majority. As to the choice between BBI and Charles River, however, Commissioner Johnson stated that he felt "no passion," that a weighing of the merits of the Charles River and BBI proposals was not overwhelming and that he did not "believe the comparative hearing process an especially useful device for disposing of matters of this significance." 16 FCC 2d at 27 (WHDH Appendices at 78a). Commissioner Johnson's separate concurring opinion reveals no substantive basis to support his vote for the grant of the BBI application. On that question his concurrence was really an abstention. Thus, only two Commissioners, less than a majority of the assumed quorum, explained or justified the grant to BBI. Charles River argued in the court below that where less than a majority of a quorum of the Commission agrees on a rationale for Commission action, such action is not legally valid. *Chicago B. & Q. R. Co.* v. *United States,* 60 F.Supp. 580, 583 (E.D. Ky. 1945). Although Charles River knows of no other case explicitly reaching such a conclusion, this conclusion is implicit in other court decisions. See *e.g., Flotilla Products, Inc.* v. *FTC,* 358 F.2d 224, 230 (9th Cir. 1966) *rev'd on other grounds,* 389 U.S. 179 (1967), where the court held that the concurrence was sufficient to permit the assumption that the views of the majority opinion were substantially adopted by the concurring Commissioner, and *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* 124 U.S. App. D.C. 63, 361 F.2d 80 (1966), where the court rejected a challenge to a decision of the Maritime Commission on the ground that no rationale for the decision had gained

the support of a majority of the Commissioners finding that, as the concurring opinion of the Chairman did not depart from the views of the other Commissioners voting for the decision, a majority had, in fact, joined in a single, sustainable, rationale. In the instant case, Commissioner Johnson explicitly rejected the rationale of the other two Commissioners voting for BBI. Therefore, his concurrence cannot be construed, as the concurrences in the cases just referred to, as substantial adoption of the majority opinion.

The court below did not dispute Charles River's contention that no rationale for the selection of BBI instead of Charles River gained the support of a majority of the Commissioners participating in this aspect of the case. Rather, the court held that it was sufficient for Commissioner Johnson to have voted for BBI "solely in order to avoid an impassee" (WHDH Appendices at 39a). The court's holding in this regard was based upon analogy to the "accepted judicial practice for a judge to cast a vote . . . in order to avoid an impasse and secure an effective mandate for the court." (WHDH Appendices at 40a). The court's reliance upon this analogy bares the error in its holding on this aspect of the case. Administrative agencies, unlike courts, are required by statute to articulate the grounds on which their decisions are based. 5 U.S.C. § 557(c). Absent such articulation, there is no way for a reviewing court to determine whether "the grounds upon which an agency acted in exercising its powers were those upon which its action can be sustained." See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-68 (1962). Although the court below suggests (WHDH Appendices at 40a) that the defect in the

Commission's grant to BBI resulting from the failure of a majority of a quorum to join in a rationale for the grant was cured by the Commission's action on Charles River's petition for reconsideration, it is clear from a reading of the Memorandum Opinion and Order denying reconsideration that the Commission never addressed itself to this issue. 17 FCC 2d 856, 867-68 (WHDH Appendices at 316a-317a).

B.

In addition to the fundamental procedural issues discussed above which the court below failed adequately to resolve, the court's opinion also permitted a serious defect in the substantive aspects of the Commission's decision making process to remain uncorrected. In 1965 the Commission adopted its *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (WHDH Appendices, pp. 350a-372a). The *Policy Statement* was promulgated "to serve the purpose of clarity and consistency of decision" in the processes of selecting from among applicants in the broadcast services. 1 FCC 2d at 394 (WHDH Appendices at 351a). To achieve this result, the Commission set forth in the *Policy Statement* a series of basic standard comparative criteria which, under ordinary circumstances, were to be relied upon in evaluating competing applicants for broadcast facilities. Among these critera was the extent to which the owners of a station would participate full-time in a station's operation in management positions. This criterion has come to be referred to as "integration."

The importance of integration, as conceived in the *Policy Statement,* was that the extent of the participation of ownership in the day-to-day management of a

station would serve as an indicium of how an applicant might be expected to discharge its public interest obligations in the future if awarded a facility. In other words, the greater the proposed integration of ownership and management, the stronger the presumption that an applicant's programming would be attuned and responsive to the changing needs and interests of its community. Substantial integration was believed to have a direct bearing on the extent to which the Commission could rely upon an applicant to provide programming responsive to the community it sought to serve.

In granting BBI's application rather than Charles River's, the Commission relied to a great extent on the finding that BBI's integration proposal was superior to Charles River's. At the same time, however, the Commission accepted the conclusion of the Examiner that BBI's local programming proposal was so exaggerated that a suspicion had been created that the proposal had been "flashed for its supposed value in comparison." The Commission, accordingly, assessed BBI with a demerit on its programming proposal for overstating it. 16 FCC 2d at 16 (WHDH Appendices at 67a).

Charles River argued in the court below that, having found BBI's programming proposals to be so unreliable as to warrant a demerit, the Commission improperly based its preference of BBI over Charles River on a finding of superior integration, particularly where the Examiner, though not discarding BBI's representations as to integration entirely, found them to be seriously suspect. 16 FCC 2d at 245 (WHDH Appendices at 286a). The essence of Charles River's argument was that, since BBI's programming proposal had

been found to be unreliable by the Commission, such a finding pervaded every aspect of the BBI application and vitiated any preference to which BBI may otherwise have been entitled for superior integration. This conclusion is inevitable since the rationale behind integration as a comparative criterion is that it serves as an indicium of the prospects that an applicant's programming will serve the public interest. Once the reliability of an applicant's programming proposal has been found to be suspect for reasons independent of integration, integration becomes a meaningless standard for comparative evaluation. In other words, it is completely illogical to favor an applicant on the ground that its programming proposal is most likely to be effectuated in the interest of the community it proposes to serve based on its superior integration when the programming proposal itself has been found suspect.

The court below erred, therefore, in focusing in the abstract upon the Commission's finding that BBI was superior to Charles River with respect to integration. BBI's superior integration was a meaningless criterion on which to select BBI as the superior applicant once its programming proposals themselves had been found to be unreliable. By failing to reverse the Commission's decision in favor of BBI on the basis of integration where the record belied the predictive value of the integration criterion, the court below permitted the integration criterion in comparative proceedings to be transformed from a meaningful predictive standard for selection between applicants to a meaningless abstract formula, favoring, thereby, form over substance. To insure rationality in the Commission's decision making processes, this transformation must be corrected.

CONCLUSION

The petition for writ of certiorari should be granted.[3]

Respectfully submitted,

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May, 1971

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[3] Petitioner desires to call to the attention of the Court a development in this proceeding which, although not part of the instant record, may have a bearing on the Court's course of action. On April 21, 1971, WHDH filed with the Commission a "Petition for Further Proceedings on Application of Boston Broadcasters, Inc." requesting that the Commission seek leave of the Court to reopen the record for further evidentiary hearing on the basis of evidence uncovered by WHDH bearing on the qualifications of Boston Broadcasters, Inc. to be a licensee of the Commission. On May 6, 1971, Charles River filed comments with the Commission in support of WHDH's petition. On May 11, 1971, BBI filed an extensive opposition to the petition. The Commission has not yet acted on this matter. Should the Commission find merit in WHDH's petition as supported by Charles River's comments and seek leave to reopen the record or to take such other action as it may deem appropriate in view of the showing made to it, the Court may conclude that the appropriate disposition of the instant petition would be to return the entire cause to the Commission to permit further findings prior to final judicial resolution of the case. *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); *Fleming* v. *F.C.C.*, 225 F.2d 523, 526 (D.C. Cir. 1955). The Court may, therefore, wish to delay disposition of the instant petition pending Commission action on the matters pending before it.

SUPPLEMENTAL APPENDIX

A. Statutes:

Communications Act of 1934, as Amended, 48 Stat. 1064, 47 U.S.C. 151-609:

1. Section 154(h) provides in pertinent part as follows:

> Four members of the Commission shall continue a quorum thereof.

2. Section 308(a) provides in pertinent part as follows

> The Commission may grant construction permits and station licensees, or modifications or renewals thereof, only upon written application therefor received by it. . . .

3. Section 309 provides in pertinent part as follows:

> (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> (b) Except as provided in subsection (c) of this section, no such application—
>
> > (1) For an instrument of authorization in the case of a station in the broadcasting or common carrier services,
> >
> > * * *
> >
> > shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.
>
> * * *

(c) * * *

(2) * * * If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(d) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally . . . . Any hearing subsequently held upon application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate . . . .

* * *

Administrative Procedure Act, as amended, 80 Stat. 381-388. 5 U.S.C. 551-559.

Section 557(c) provides in pertinent part as follows:

* * * All decisions . . . are a part of the record and shall include a statement of—

(1) Findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and

(2) the appropriate rule, order, sanction, relief or denial thereof.

Rules and Regulations of the Federal Communications Commission 47 CFR:

Section 1.282; 47 CFR 1.282, provides as follows:

(a) After opportunity has been afforded for the filing of proposed findings of fact and conclusions, excep-

tions, supporting statements, briefs, and for the holding of oral argument as provided in this subpart, the Commission will issue a final decision in each case in which an initial decisions has not become final.

(b) The final decision shall contain:

(1) Findings of fact and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record;

(2) ruling on each relevant and material exception filed; and

(3) the appropriate rule or order and the sanction, relief or denial thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., CHARLES RIVER CIVIC TELEVISION, INC., AND BOSTON BROADCASTERS, INC., *Respondents*

No. 1708

CHARLES RIVER CIVIC TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., BOSTON BROADCASTERS, INC., WHDH, INC., *Respondents*

No. 1716

GREATER BOSTON TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WHDH, INC., *Respondents*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT BOSTON BROADCASTERS, INC. IN OPPOSITION

QUESTIONS PRESENTED

Following administrative proceedings originally commenced in 1954 to select a licensee to operate a tele-

vision station on Channel 5 in Boston, WHDH, Inc., received a construction permit in 1957 and began broadcasting that year, continuing to the present time. The construction permit was later set aside by the Commission because of the discovery in 1958 (while an appeal from the Commission's decision was pending in the Court of Appeals) of *ex parte* contacts occurring in 1955 and 1956 between WHDH's President, Robert Choate, and the then FCC Chairman, while WHDH's application was in an adjudicatory posture before the Commission. WHDH has been operating the station since 1957 under a series of temporary authorizations and a license limited to four months because of the "inroads made by WHDH upon the rules governing fair and orderly adjudication." (App. D-4, p. 331a) In response to an invitation by the Commission, respondent BBI and others filed new applications in 1963 and, in January 1969, after protracted hearings, the Commission granted the application of BBI and denied the others. (App. D-1, p. 52a) The Court of Appeals sustained the Commission's decision in all respects. (App. A, p. 1a)

The question presented in the three petitions for certiorari filed by the unsuccessful applicants are:

No. 1622 (WHDH, Inc., Petitioner)

1. Whether the Commission and the court below were justified in using the "tainted overtures" of Petitioner WHDH and the resulting "inroads made by WHDH upon the rules governing fair and orderly adjudication" as a reason for treating its application for renewal of license as *sui generis,* and requiring it to undergo a full comparative

hearing with new applicants for the facility, rather than as a conventional licensee seeking renewal.

2. Whether the court below failed to judge the Commission's decision solely upon the grounds which the record discloses were invoked by the agency.

No. 1708 (Charles River Civic Television, Inc., Petitioner)

1. Whether the court below erred in declining to hold invalid a 3-1 decision of the seven-member Commission in favor of BBI where (a) the dissenting Commissioner voted to renew the WHDH license, two Commissioners joined in the published Decision in favor of BBI and the fourth Commissioner concurred because he deemed his "participation . . . necessary to constitute a working majority for decision" and (b) in disposing of a petition for rehearing filed by Charles River raising the quorum question, the fourth Commissioner joined in a denial of the petition without reservation.

2. Whether the court below erred in affirming the Commission's Decision granting BBI's application, despite a "slight demerit" assigned to BBI by the Commission because of insufficient substantiation of its program proposal.

No. 1716 (Greater Boston Television Corporation, Petitioner)

1. Whether the court below adequately reviewed and disposed of the Commission's 1962 Decision denying the application of Greater Boston Television Corporation.

STATEMENT

Respondent BBI adopts the Statement of the case set forth in the Brief of the Respondent Federal Communications Commission.

ARGUMENT

Apart from the other clear and compelling reasons for denying the writ, two considerations seem to us to be overriding: (1) the extraordinary longevity of this litigation, and (2) the meticulous care and concern manifested by the Court of Appeals that every contention advanced by the parties, no matter how insubstantial, be fully considered and determined in order that this litigation be brought to an early and definitive conclusion. "Some time litigation must come to an end." (App. H7).. These were the words of the Court of Appeals in its opinion of April 15, 1971, denying WHDH's motion to remand. The Court also said:

> "This case has gone to a ruling. Rehearing has been denied. We could have terminated our stay forthwith, since it was granted to a party we ruled against on the merits. We continued the stay on condition a petition for certiorari was filed within 60 days from the denial of rehearing. Our assumption was that this would permit Supreme Court disposition this Term." (App. H7)

After seventeen years of litigation the Federal Communications Commission has been fully sustained by the Court of Appeals in its final resolution of the question of which of the various competing applicants should be awarded a license to operate a Channel 5 television station in Boston. None of the petitions for *certiorari* filed by the three unsuccessful applicants presents any grounds for Supreme Court review or further prolongation of these proceedings.

This case presents none of the grounds customarily relied upon in an application for review of a federal agency action. No general question of statutory interpretation is involved. No conflict of decisions can be alleged. No issue of federal law of substantial importance is presented which has not been, but should be, settled by this Court. It is not claimed that the court below has decided a federal question in a manner conflicting with an applicable decision of this Court. Rather, WHDH relies on the uniqueness of the case to invoke the clause in Rule 19 of this Court dealing with an action of a lower court which "so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision." Consideration of the facts and the law will quickly demonstrate, however, that few less likely candidates have ever been presented to this Court for *certiorari* on this or on any other ground.

I. THE WHDH PETITION (CASE NO. 1622)

At page 27 of its petition, WHDH states that "this is indeed a unique case". In its Conclusion it says:

> "This case cannot fairly be characterized other than as a blot on, and a grievous injury to, the administrative process."

BBI agrees with both of these observations, although for reasons at substantial variance from those advanced by WHDH.

This case is unique because WHDH is the only applicant-permittee of a television station found by the Commission to have been guilty of tampering with its administrative processes which was nevertheless permitted to compete with new applicants on an equal

basis in a reopened proceeding,[1] and to continue to operate the facility at issue during such further proceedings.[2]

The case is a blot on the administrative process because of the length of time it has taken to vindicate the public interest after it was established that WHDH had sought, off the record, to influence a Commission decision. This case has achieved a unique place in the annals of administrative law for the inordinate length of time consumed by the proceedings. Nearly thirteen years have passed since the Court of Appeals for the District of Columbia Circuit was informed of testimony before the Legislative Oversight Committee of the House of Representatives concerning *ex parte* approaches by WHDH, Inc., to the then-Chairman of the Commission. It is over ten years since the Commission unanimously found that such approaches occurred and were designed to influence the Commission outside the recognized processes of adjudication. It is nearly nine years (three regular television license terms) since WHDH received its bobtail "four-month license".

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[1] In the Miami Channel 10 and Channel 7 cases, every applicant guilty of *ex parte* conduct, whether resulting in actual contact with a Commissioner or not, was disqualified. See *WKAT, Inc.* v. *F.C.C.*, 258 F. 2d 418 (D.C. Cir., 1958); *Biscayne Television Corp.*, 31 FCC 237 (1961). See also *South Florida Television Corp.* v. *F.C.C.*, 349 F. 2d 971 (D.C. Cir., 1965); *Community Broadcasting Corporation* v. *F.C.C.*, 363 F. 2d 717 (D.C. Cir., 1966).

[2] In the Jacksonville and Orlando proceedings, where *ex parte* activities were shown to have occurred in the original proceedings, but not on behalf of the winning applicants, the Court of Appeals nonetheless directed further proceedings on a new record, and required that the interim operation of the station be by a group composed of all new applicants; see *Community First Corporation* v. *F.C.C.*, 403 F. 2d 578 (D.C. Cir., 1968); *Consolidated Nine, Inc.* v. *F.C.C.*, 403 F. 2d 585 (D.C. Cir., 1968).

A.

The Commission's Treatment of WHDH as Not Being an Ordinary Renewal Applicant Was Fully Justified.

The foundation upon which all of WHDH's arguments rest is that it is a "regular renewal applicant" entitled to certain benefits which it has not received. WHDH persists in this argument despite the fact that the Hearing Examiner found, without exception by WHDH, that it did not have such status, and the Commission clearly reached the same result as the Examiner.

In paragraph 729 of his Initial Decision, Examiner Sharfman defined WHDH's status as follows:

> "729. Only superficially ambiguous is WHDH's position. On examination the ambiguity disappears. In approving WHDH's application for a short term only, the Commission neither blessed nor irrevocably condemned it, but allowed it to live, knowing that its Mayfly's term would be extended by operation of the APA's section 9, section 307(d) of the Communications Act, and rule 1.62, pending final decision after hearing on its application. The Commission, by its actions, defined the nature of WHDH's tenure. It is not an occupant under an ordinary authorization, but one who was expected shortly to justify its claim to continued existence. All licensees are subject to the possibility that someone may try for their places, but as Commission records show, the likelihood of a contest between an incumbent and another is small; in the present case, however, it did not take unusual prescience to forecast the filing of competing applications for the WHDH channel. In this inevitable contest it could not have been the Commission's expectation that WHDH would be entitled to assert competitive advantages merely because it is a renewing licensee; nor can Hearst

and Wabash Valley be regarded as supporting any such claim, if WHDH meant to advance it by its citation of these cases (par. 721, above)." (App. D-2, pp. 274a-275a)

WHDH did not take exception to this description of its status.

In its May 20, 1969 Opinion and Order disposing of Petitions for Rehearing of its January 22, 1969 Decision the Commission stated:

"40. In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the '. . . inroads made by WHDH upon the rules governing fair and orderly adjudication . . . .' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for Channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." (App. D-3, p. 322a)

The court below agreed with the Commission (App. A, pp. 21a-26a), and disposed of WHDH's argument in the following terms:

> "WHDH insists, however, on an approach which would give it all the rights and expectancies of an ordinary renewal applicant. In the ordinary case such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. This position does not fairly characterize the situation of a licensee which, by virtue of its officer's impropriety, has been given only temporary operating authority of one kind or another (including the 4-month license). This was the conclusion of both the Hearing Examiner and the Commission (as refined on reconsideration), and we think it within the range of reasonable discretion." (App. A, p. 33a)

WHDH (pp. 13-14) relies on the Commission's 1970 *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants* (App. F), and seeks to distinguish the exception in that *Policy Statement* for "those unusual cases, generally involving court remands, in which a renewal applicant is for *sui generis* reasons to be treated as a new applicant." (App. F, p. 379a). The language of the exception is tailor-made to fit this case: Indeed, on the very day of the *Renewal Policy Statement's* adoption, the Commission in a related action expressly noted that "the WHDH case was not the usual comparative renewal case but rather was of a *sui generis* nature . . . . " *BEST, et al.,* 21 FCC 2d 355 (1970).

The simple fact is that this has been a unique case since Mr. Choate's contacts with FCC Chairman Mc-

Connaughey were first publicly disclosed in 1958. It has continued to be a unique case ever since. In support of its argument that it has been the victim of a discriminatory injustice, WHDH readily concedes that this is a unique case, and asserts that "this case can never recur". But the fact is that it can recur, and it will, whenever an applicant before an administrative agency is found to have tampered with its processes. The likelihood of its recurrence depends in substantial measure upon the willingness of the agencies and the Courts to deal with such attempts quickly and effectively.

In claiming that it "stands as the only licensee with a valid existing license that has ever been given comparative consideration under the criteria reserved for initial applicants in the Commission's entire history" (p. 17), WHDH has overlooked some fairly recent history. Four month licensees other than WHDH have been required to undergo comparative hearings before the Commission without the benefit of any special status as a licensee seeking renewal. Indeed, in these other cases these special licensees (unlike WHDH) had engaged in no wrongdoing, but had received abbreviated licenses only because the wrongful conduct of other earlier competitors had left them as the sole qualified applicants: *L. B. Wilson, Inc.*, 37 FCC 511 (1964), aff'd. *sub nom. South Florida Television Corp.* v. *F.C.C.*, 349 F.2d 971 (D.C. Cir., 1965), *cert. den.* 382 U.S. 987 (1966); *Sunbeam Television Corporation*, 38 FCC 805 (1965), aff'd. *sub nom. Community Broadcasting Corporation* v. *FCC*, 363 F.2d 717 (D.C. Cir., 1966). The *Wilson* and *Sunbeam* proceedings, like this one, had their inception in the *ex parte* disclosures of the late 1950's. *Wilson* and *Sun-*

beam were the surviving unblemished applicants for Miami Channels 10 and 7, respectively, and each was awarded a license limited to four months, in order to afford an opportunity for new applicants to come forward. Following further comparative hearings, the Commission renewed the *Sunbeam* and *Wilson* licenses, but only because each had established its superiority over the new, competing applicants under the Commission's standard comparative criteria, and not because either was entitled to special consideration merely because it was an applicant seeking renewal of license. It becomes apparent that solid precedents support the treatment accorded WHDH.

B.

WHDH Has Had Full Judicial Review of Its Arguments.

Obviously as an afterthought, WHDH argues that the action of the Commission in limiting WHDH to a 4-month license was based upon a factual record that was never the subject of judicial review (p. 24). The record shows otherwise, however, for the Commission's Findings and Conclusions, based on the special hearing before Judge Stern, were confirmed and adopted in the Commission's September 25, 1962 decision (App. D-3, p. 327a). WHDH appealed from that order in 1963 (D.C. Cir. No. 17,788), and consideration of that interrupted case was consolidated with the appeals from the Commission's 1969 grant to BBI. In the opinion below, nine pages (App. A, pp. 17a-35a) are devoted to the findings, reasoning and conclusions of the July 1960 decision of the Commission and of the November 1960 Report to the court below and to the remedial measures the Commission adopted in the light of such conclusions. Noting that

the Commission had taken a different view of Choate's conduct than Judge Stern, the Court held: "The Commission was within the range of its discretion when it found misconduct"; "when it decided to take remedial measures"; and "when it adopted, as successive remedial measures, voiding the original grant to WHDH . . . , remanding for a comparative reevaluation of the original applicants; confining the grant to WHDH . . . to a mere 4-month operating license; providing for a reopening period of two months in order to permit a comparative evaluation with new applicants proposing to serve the public interest." (App. A, p. 30a).[3] Clearly, WHDH has had its review.

C.

In Its Review of the Commission's Decision the Court Below Followed the Chenery Doctrine Scrupulously.

Notwithstanding the clear language of paragraph 40 of the Commission's May 20, 1969 Memorandum Opinion and of its decision in *BEST, supra,* Petitioner WHDH insists that the Court below fashioned an original basis of support for the Commission's conclusions which was not even suggested in the agency's pronouncements.

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[3] The frivolous nature of WHDH's argument is revealed by its suggestion that, in referring to the Commission's July 1960 Decision rather than its November 1960 Report and Recommendation, the Court below reviewed the wrong document (p. 24). The facts are as stated in an interlocutory order of the Commission adopted May 24, 1961:

> "The United States Court of Appeals for the District of Columbia Circuit has approved the Commission's Report and Recommendation, *which document embodied the findings and conclusions contained in the Commission's Decision of July 14, 1960. . . . (WHDH, Inc.,* 20 Pike and Fischer Radio Regulation 410e) (emphasis supplied.)

No more answer to Petitioner's *Chenery*[4] argument would appear to be required than what is found in the four corners of the opinion below. The Court's review of and reliance upon the findings with reference to Mr. Choate's *ex parte* approaches were fully set forth (App. A, pp. 27a-30a). Its study of and dependence upon the Commission's analysis of the unique nature of the renewal application here in issue, were clearly stated (App. A, pp. 22a-26a). In a word, the record leaves no room for doubt that it was the Commission and not the Court of Appeals which supplied the rationale of the decision in this case.

II. THE CHARLES RIVER PETITION (CASE NO. 1708)

A.

The Court Below Correctly Held That the Commission's Decision Was Supported by a Majority of a Quorum.

The no-quorum and no-majority-of-a-quorum argument of Petitioner Charles River was made below and characterized by the Court as "a subtle, technical contention which is deftly stated" (App, A, p. 39a). The Court below disposed of the point in the following language:

> "The short answer is that four out of seven Commissioners constitutes a quorum; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present; and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI.

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[4] *Securities & Exchange Commission* v. *Chenery*, 318 U.S. 80 (1943) and 332 U.S. 194 (1947).

> Even assuming that Commissioner Johnson voted for BBI solely in order to avoid an impasse and to provide an effective order, that is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality. Government often involves the choice of the feasible, and the selection of the least undesirable alternative. It is accepted judicial practice for a judge to cast a vote, at least assuming no violation of conscience is involved, in order to avoid an impasse and secure a legally effective mandate for the court. We also note that when this point was raised in the application of Charles River for reconsideration, Commissioner Johnson expressed no reservation in voting to deny that application and uphold the grant to BBI." (App. A, pp. 39a-40a) (footnotes omitted)

In his opinion, Commissioner Johnson said ". . . my participation is necessary to constitute a working majority for decision. Accordingly, I concur in today's decision" (App. D-1, p. 78a). This makes it clear beyond doubt that Charles River's contentions to the contrary notwithstanding, he was concurring, not abstaining, and he was agreeing with, not rejecting the rationale of Commissioners Bartley and Wadsworth. Commissioner Johnson's unreserved joinder in the rejection of Charles River's petition for rehearing raising the no-quorum point (App. D-3, pp. 316a, 317a, par. 25) is conclusive confirmation that a majority of a quorum voted for BBI.[5]

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[5] It is true that in passing on the petition for rehearing, the Commission did not expressly deal with the no-majority-of-a-quorum argument, as asserted by Petitioner Charles River (p. 15). But that fact can give Petitioner little comfort since the reason the argument was not considered is that it was never made by Charles River before the Commission, at least in any understandable form, and, therefore, on familiar principles should not even be open here.

B.

There Was No Error by the Commission or the Court Below in Declining To Attribute General Unreliability to BBI Because It Was Assigned a "Slight Demerit Because of Its Insufficiently Supported Local Live Program Proposal".

In Section B of its Argument, Petitioner Charles River (pp. 15-17) attempts unsuccessfully to balance its whole case on the point of a needle. The entire claim there made of "a serious defect in the substantive aspects of the Commission's decision making process" (p. 15) rests completely on a finding of the Examiner, asserted by Petitioner to have been accepted by the Commission, that BBI's local programming proposal had been "flashed for its supposed value in a comparison" (p. 16). It is true that the Examiner found that BBI's large amount of proposed local live programming "intensifies the suspicion that BBI's figure . . . was flashed for its supposed value in a comparison" (App. D-2, p. 288a, par. 762). It is also true, however, that BBI excepted to this conclusion in its Exception 138, as follows:

> "138. To Paragraph 762, insofar as it infers that the BBI proposal for local live programming 'was flashed for its supposed value in a comparison' as a wholly unwarranted and unsupported conclusion."

This exception was granted by the Commission in the following language:

> "Exception No. 138. Granted and the complained of phrase in par. 762 of the examiner's initial decision is deleted." (App. D-1; p. 73a).

With the removal of what was already fragile support for a shaky argument, the entire structure of Section B collapses. All that is left is the assessment by

the Commission of a slight demerit to BBI because of its insufficiently supported local live programming proposal (App. D-1; par. 39, p. 67a), held by the Commission to be "offsetting" against a slight demerit assessed against Charles River (App. D-1, pp. 67a-68a). This was quite properly held by the court below as far short of a character defect which might vitiate the BBI application (App. A, p. 40a).

In any event, this question is entirely factual in nature, depends upon an evaluation of the record, and clearly does not warrant further review by this Court.

III. GREATER BOSTON'S PETITION (CASE NO. 1716)

A.

There Was No Error by the Commission or the Court Below in Their Treatment in 1969 and 1970, Respectively, of Contentions of Greater Boston I Attacking the Validity of the Grant of a Four-Month License to WHDH in 1962.

Greater Boston I rests its petition on the contention that, in the procedural maze of these consolidated cases, the application of Greater Boston I became lost in the shuffle of court review. The fact is that it was the *applicant,* not the *application,* which became lost, as an examination of its schizophrenic history will quickly establish. Moreover, the Opinion of the court below makes it plain that Greater Boston I's contentions were fully considered, even though, because of their lack of merit, their disposition required little space.

Petitioner Greater Boston Television Corporation (Greater Boston I) was incorporated in 1952 (p. 5) and filed its application to operate on Channel 5 in Boston in 1953. It is from the lower court's affirmance of the Commission's 1962 denial of that application that it is now seeking review. In 1963, Greater

Boston TV Co., Inc. (Greater Boston II) was incorporated and it filed its application to operate on Boston Channel 5 in March of that year, responding to the same invitation which beckoned BBI and Charles River. Of the 36 stockholders of Greater Boston I, two had died and 4 others had moved far away from Boston; the remaining 30 were invited to participate and 26 accepted in addition to 14 newcomer invitees (App. D-2; par. 200, p. 138a). Because of the substantial identity in ownership of the two corporations, it was necessary for Greater Boston II to obtain a waiver of the Commission's Rules against repetitious applications. (App. D-2, p. 81a, par. 1; p. 142a, par. 218) The rationale of the Commission in granting the waiver obviously was to permit the principals of Greater Boston I to update their showing to the Commission so that they might compete with WHDH on a fresh rather than a stale record. (App. D-1, p. 53a, Fn. 3) From the subsequent conduct of the Greater Boston principals, it appears that *their* rationale in seeking the waiver was the exact opposite of the Commission's. Their preparation for the new proceeding began and ended with the formation of a new corporation. Instead of updating their presentation to the Commission, they defaulted so completely before the Examiner that Greater Boston II was disqualified even from comparative consideration (App. D, pp. 57a, 70a). Although Greater Boston II noted an appeal from the disqualification, its brief was rejected as in violation of court rules. Now in the guise of Greater Boston I, essentially the same principals come before this Court claiming minimal connection with Greater Boston II and with its collapse in the second proceeding. Their goal is to attempt by some alchemy to convert their corporate veils into iron curtains, in disregard of the fact

that the record was closed on their comparative case over fifteen years ago.

Jointly or severally the Greater Boston applicants are anachronisms, without legal support for their position. Although Greater Boston II has not petitioned for *certiorari,* the aroma of its presentation still surrounds Greater Boston I because of the overlapping of principals. Of the five members of the Commission participating in the 1962 Decision, review of which is now sought, not a single one voted for Greater Boston I. Moreover, in reviewing that Decision, the Court below specifically referred to its reexamination of the Commission docket before it in 1963 (App. A, p. 27a). It was well aware of Petitioner's argument that WHDH should be absolutely disqualified because of Mr. Choate's *ex parte* activities (App. A, p. 32a). Indeed, the final words in its Opinion were devoted to the primary objective of the Greater Boston principals which was to confine the Commission in the Boston Channel 5 case to consideration limited to the original record made in the 1950s. (App. A, p. 43a, Fn. 44)

It becomes clear that not only has Petitioner had its day (in fact, years) in court, but that no party except WHDH has had more chances to gain the right to operate on Channel 5 than the Greater Boston principals. For them no less than for WHDH, all good things must end.

IV.

CONCLUSION

Since 1957, WHDH has buttressed its influence over the Boston area by adding the power of a television station to that of a 50,000 watt AM station, a full power FM station and its newspapers. It has reaped large

economic benefits from its television operation. It has devised ingenious means for perpetuating this case far beyond the period that anyone but Petitioner WHDH could have dreamed possible. It appears to have an apparently inexhaustible stock of dilatory tactics in mind to postpone the inevitable day its television station will go off the air.[6]

When this case came before the Court of Appeals in 1970, it presented a tangled skein, procedurally and substantively, complicated by the series of appeals, remands and consolidations, which all derived from the "violence to the integrity of the Commission's processes" done by WHDH's improper *ex parte* contacts. With painstaking care, in an opinion which is a model of judicial conscientiousness and scrupulous concern

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[6] Notwithstanding the expressed concern of the court below with the delays in concluding this proceeding, WHDH on March 9, 1971, filed with the court a "Motion to Remand" the proceeding to the Commission for the purpose of probing the mental processes of one of the Commissioners participating in the 1969 Decision. The Motion was denied by the court on April 15, 1971, in an order set forth at Appendix H to WHDH's Petition. Six days later, and just two days before lodging its Petition with this court, WHDH filed with the Commission a "Petition for Further Proceedings on Application of Boston Broadcasters, Inc.", in which it prays that the Commission conduct an investigation into the qualifications of BBI on the basis of "newly-discovered" evidence, some of which predates the Commission's 1969 Decision. Supporting Comments were submitted by Charles River and an extensive Opposition, by BBI. On May 18, 1971, BBI filed with the Commission a Request for Specification of Termination Date predicated in part upon the abuse of process manifested by WHDH's repeated and baseless filings in defiance of uniformly accepted concepts of administrative finality and orderly judicial review. The dilatory intent of the WHDH-Charles River filings is further confirmed by Charles River's gratuitous suggestion (p. 18, Fn. 3) that this Court postpone disposition of its own petition for *certiorari* until the Commission has acted on the matters pending before it.

for the rights of all the parties, the Court of Appeals patiently unraveled the skein and carefully considered every facet of the case. Every question now raised before this Court in each of the three petitions for *certiorari* was fully examined and correctly disposed of in the court below. We respectfully urge that, in the interest of sound judicial administration as well as preventing further unnecessary prolongation of an already far-too-long litigation, the time has come to close the books on the Channel 5 case by a prompt denial of the writs at the present term of Court.

Respectfully submitted,

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May 24, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 1708

CHARLES RIVER CIVIC TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 1716

GREATER BOSTON TELEVISION CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–43a) [1] is not yet officially reported. The Federal Com-

[1] "Pet. App." refers to the separately bound Appendix in No. 1622, except that Pet. App. H appears at the back of the petition in No. 1622.

munications Commission's decision (Pet. App. 52a–79a) and its memorandum opinion and order modifying that decision in part (Pet. App. 306a–325a) are reported at 16 F.C.C. 2d 1 and 17 F.C.C. 2d 856, respectively. The initial decision of the hearing examiner (Pet. App. 80a–305a) is reported at 16 F.C.C. 2d 29.

Earlier court decisions connected with this case are *Greater Boston Television Corp.* v. *Federal Communications Commission*, 334 F. 2d 552 (C.A.D.C.) (Pet. App. 47a–51a); *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 295 F. 2d 131 (C.A.D.C.), certiorari denied, 366 U.S. 918, and *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55 (C.A.D.C.). Earlier Commission decisions in this case are *WHDH, Inc.*, 1 Pike and Fischer R.R. 2d 468; *WHDH, Inc.*, 25 Pike and Fischer R.R. 78, 80; *WHDH, Inc.*, 33 F.C.C. 449 (Pet. App. 326a–344a); *WHDH, Inc.*, 29 F.C.C. 204.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1970 (Pet. App. 44a); petitions for rehearing were denied on February 16, 1971, (Pet. App. 44a); and the order of the court of appeals denying the motion of WHDH, Inc. to remand, denying various other motions, and granting WHDH a limited stay was entered April 15, 1971 (Pet. App. H1). The petition in No. 1622 was filed on April 23, 1971; that in No. 1708, on May 14, 1971; and that in No. 1716, on May 17, 1971. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

STATUTES AND REGULATIONS INVOLVED

Sections 307(d), 309(b) and 310(b) of the Communications Act of 1934 (48 Stat. 1083, 1085, and 1086, as amended, 47 U.S.C. 307(d), 309(b) and 310(b)) and pertinent provisions of the Rules and Regulations of the Federal Communications Commission (47 C.F.R. 1.533(a); 1.539 (a) and (d), and 73.34(a)(8)) are set forth at Pet. App. 383a–386a. Section 154(h) (48 Stat. 1066, as amended, 47 U.S.C. 154(h)) is set forth in the appendix to the petition in No. 1708 at p. 1a.

QUESTIONS PRESENTED

1. Whether there was a rational basis for the Federal Communications Commission's decision to consider an application for renewal of a television license on a comparative basis with other applications for the channel when the renewal applicant had been given only a limited license because of improper *ex parte* attempts to influence the Commission.

2. Whether the court of appeals affirmed the Commission's decision upon the same basis articulated by the agency.

3. Whether the Commission's decision was made by a statutory quorum.

4. Whether, in this case, the Commission correctly evaluated its comparative broadcast license factor relating to integration of ownership with management.

5. Whether the court of appeals adequately considered the appeal of Greater Boston Television Corporation from denial of its application for a license.

STATEMENT

In 1954 the Commission had before it for comparative consideration four mutually exclusive applications for a new television station on Channel 5 in Boston, Massachusetts. Among the applicants were WHDH, Inc. (petitioner in No. 1622), a subsidiary of the corporation which publishes a daily newspaper, the Boston Herald Traveler, and Greater Boston Television Corp. ("Greater Boston", petitioner in No. 1716). In April 1957, the Commission awarded the channel to WHDH, which began operation later th. year (Pet. App. 4a).

While an appeal by Greater Boston and other disappointed applicants was pending, it came to the court's attention that the award might have been tainted by improper *ex parte* approaches to the Commision's Chairman. Retaining jurisdiction, the court remanded the case to the Commission for an evidentiary hearing on this issue.

The hearing, before a special examiner,[2] disclosed that Robert Choate, WHDH's principal, had arranged two luncheons with the Chairman: the first for the purpose of "sizing him up" and the second to urge him to support pending legislation which would restrict the Commission's policy of encouraging diversification of mass media. This policy was

[2] The Honorable Horace Stern, a former Justice of the Supreme Court of Pennsylvania.

a factor which could affect WHDH's pending application because of its newspaper affiliation. Rejecting its special examiner's recommendation that WHDH be exonerated, the Commission reported to the court that Mr. Choate had "demonstrated an attempted pattern of influence" in favor of WHDH, and that the "* * * attempt to establish such a pattern of influence does violence to the integrity of the Commission's process." *WHDH, Inc.*, 29 F.C.C. 204, 211, 212. The Commission proposed to vacate the original WHDH permit, grant special temporary operating authority that would allow WHDH to continue broadcasting, and reopen the entire proceeding for a new comparison of WHDH with the other applicants then before the Commission (Pet. App. 6a). The court approved and remanded. *Massachusetts Bay Telecasters Inc.* v. *Federal Communications Commission,* 295 F.2d 131, certiorari denied, 366 U.S. 918 (Pet. App. 6a).

At the conclusion of the reopened comparative hearing in 1962, the Commission awarded Channel 5 to WHDH, but it assessed a demerit against WHDH for Choate's improper conduct. Because, however, of "the inroads made by WHDH upon the rules governing fair and orderly adjudication," it granted only a special short-term license of four months instead of the normal three-year license. *WHDH, Inc.*, 33 F.C.C. 449, 454 (Pet. App. 331a).

Greater Boston and WHDH both appealed from this action by the Commission. In the meantime, on October 26, 1962 WHDH had filed for renewal of its

short-term license, and the Commission determined that the circumstances which had led to the short-term grant also constituted "compelling public interest considerations" warranting acceptance of competing applications for the channel. *WHDH, Inc.*, 25 Pike and Fischer R.R., 78, 80. Accordingly, on October 24, 1963, the Commission designated the WHDH application for comparative hearing with applications filed by Boston Broadcasters, Inc. ("BBI"), Charles River Civic Television, Inc. ("Charles River," petitioner in No. 1708) and Greater Boston TV Co. Inc.[3] *WHDH, Inc.*, 1 Pike and Fischer R.R. 2d 468, 472.

Then on December 21, 1963, Robert Choate died. On being informed, the court remanded the still pending appeals from the initial four-month grant, for consideration of the effect of Choate's death on that award as limited. It also authorized the Commission to combine issues in the remanded initial proceeding with the pending renewal proceedings (Pet. 49a–51a).

Both proceedings were in a comparative hearing status, but only WHDH and Greater Boston (see note 3, *supra*) remained in the initial proceeding (Pet. 83a–84a). After a lengthy hearing, an examiner made extensive findings of fact (Pet. 80a–303a). In the initial proceeding, he concluded that there were no material changes in WHDH as a result of Choate's death and that modification of the initial award would

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[3] The majority of the stockholders of Greater Boston TV, Co., Inc., had been stockholders in Greater Boston Television Corp., one of the original 1954 applicants for the channel which is the petitioner in No. 1716.

not serve the public interest (Pet. App. 55a, 259a–261a). In the renewal proceeding, he took note of the comparative factors set forth in the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393: past performance, diversity of media control, integration of ownership and management, and program proposals. He observed that under these standards WHDH would be downgraded in an initial licensing proceeding because in two respects, management-ownership integration and media diversity, it ranked well below its competitors (Pet. App. 297a). But relying on past Commission precedents,[4] the examiner ruled that these factors were not material on renewal (Pet. App. 301a) and that WHDH's satisfactory operating record entitled it to a significant degree of preference over competitors who could present only promises of future performance (Pet. 274a–275a; 298a). He recommended that WHDH's license be renewed.

On January 22, 1969, the Commission rejected the examiner's recommendation, and directed that Channel 5 be assigned to Boston Broadcasters, Inc. (BBI) (Pet. App. 52a–71a). Of the seven Commissioners, three did not participate, leaving a statutory quorum of four members. (47 U.S.C. 154(h).) Commissioners Bartley and Wadsworth joined in a written opinion rejecting WHDH and selecting BBI. (Pet. App. 52a–71a). Their opinion ranked WHDH below BBI and

[4] These cases held that a licensee seeking renewal is entitled to a significant preference over competing applicants because of past satisfactory operations.

Charles River in management-ownership integration and media diversity, which they found highly material; BBI was found to be superior to Charles River on integration, to have a slight edge in diversity, and to be about even on programming.[5] Commissioner Johnson concurred in a separate opinion indicating his agreement on the rejection of WHDH because of its newspaper affiliation; he stated that he lacked strong views as between the other two applicants, but joined in the choice between them for the purpose of constituting "a working majority for decision" (Pet. App. 78a). Commissioner Robert E. Lee dissented on the ground that WHDH's license should have been renewed under customary renewal criteria (Pet. App. 75a–78a).

The majority ruled that the examiner had erred when he gave a major preference to WHDH because of its prior operation on Channel 5 (Pet. App. 59a). It held that the 1965 *Policy Statement,* which was based on criteria not requiring new evidence in this proceeding, should govern the comparative evaluation (*ibid.*); under the *Policy Statement,* the Commission is to give weight to an applicant's past broadcasting record only if it is clearly superior or deficient (Pet. App. 60a). Since WHDH's record of past performance was only "within the bounds of average," it was not a factor entitled to weight in the comparative evaluation (Pet. App. 60a).

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[5] The fourth applicant in the renewal proceeding, Greater Boston TV Co., Inc., failed to meet preliminary noncomparative criteria in the estimation of both the Commission majority and the hearing examiner. See Pet. App. 269a; 58a.

In its opinion on reconsideration, adopted May 19, 1969 by the same three Commissioners who had made up the earlier majority (Pet. App. 306a), the Commission explained that its application of the 1965 *Policy Statement* to WHDH was due to the fact that WHDH, while technically a renewal applicant, was markedly different from regular renewal applicants. It stated (Pet. App. 322a–323a):

> * * * [W]e think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of three years. Thus, although WHDH has operated station WHDH–TV for nearly twelve years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular three-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of four months only because of the Commission's concern with the '* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * *.' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an Order directing that new applications for Channel 5 would be accepted within a specified two-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique

> events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license. (Pet. App. 322a–333a).

The Commission also made clear in this opinion that it agreed with the examiner's assessment of the effect of Choate's death and his conclusion that reevaluation and modification of the initial four-month award to WHDH would not serve the public interest (Pet. App. 315a–316a).

On appeals by WHDH, Charles River and Greater Boston, the court of appeals unanimously affirmed the Commission in an extensive opinion by Judge Leventhal (Pet. App. 1a–43a).

The court observed that the Commission had expressly put "this case in a special and unique category because of the past history of WHDH" (Pet. App. 24a). After reviewing this history, the court held that such special treatment was within the Commission's "reasonable latitude to keep its processes free of taint" when it found misconduct in Mr. Choate's *ex parte* contacts (Pet. App. 29a), and that the Commission's choice of remedial measures was "within the range of sound discretion" (Pet. App. 30a). It found procedurally fair the Commission's determination to apply its 1965 *Policy Statement* rather than the criteria used in ordinary renewal cases, because all parties were on notice as to the factors which would be considered in the comparative hearing (Pet. App. 31a). It was therefore appropriate for the Commission to use "the tainted overtures of WHDH as a reason for fresh consideration of all

applicants, without any special advantage to WHDH by virtue of its operation under lawful but temporary authority" (Pet. App. 31a).[6]

The court rejected Charles River's claim that less than a majority of a quorum effectively joined in the Commission's decision. It noted that the statutory four out of seven commissioners had participated; and that Commissioner Johnson had joined the significant decision on reconsideration without reservation as well as voting in favor of the original decision (Pet. App. 39a). It also ruled that, as between BBI and Charles River, the Commission had properly performed its responsibility in weighing the significance of the management-integration factor (Pet. App. 40a–43a).

Petitions for reconsideration were filed by WHDH and Greater Boston. The latter contended that its appeal from the initial decision had been overlooked. The court of appeals ruled that "after continuation of the careful study of the briefs and record that the oral argument showed was needful in view of the importance and complexity of the cases,"

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[6] The court noted the Commission's 1970 *Policy Statement on Comparative Hearings Involving Renewal Applicants*, 22 F.C.C. 2d 424 (Pet. App. 373). This Statement provides that, when in a comparative hearing an applicant for renewal of a license shows that its past performance has been substantially attuned to serving its area and is not otherwise deficient, its license will be renewed without further comparison. However, the court also noted that this Statement is expressly inapplicable to "those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." (Pet. App. 26a, n. 35; 379a.)

no modification was warranted either of the result or the views set forth in the opinion[7] (Pet. App. 15a).

ARGUMENT

Essentially, the issue presented by this case is whether the Commission properly selected a licensee for a valuable television channel from among various competing applicants. The proceedings were unusually protracted because of WHDH's tainted overtures in connection with its original license application and the various administrative proceedings and judicial remands which resulted therefrom. The enormous record and the claims of the competing applicants have been thoroughly canvassed by the Commission and the court below. The petitions present no question of general importance, and there is therefore no reason for plenary review by this Court or for further delay in finally implementing the Commission's decision.[8]

1. WHDH's contention that the Commission has singled it out as the only renewal applicant ever to

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[7] Subsequent to the petition for rehearing, WHDH filed a motion in the court of appeals to remand the case to the Commission for reconsideration in the light of certain statements of Commissioner Wadsworth, published in Broadcasting Magazine after he left the Commission. The court of appeals entered a further opinion in the light of the Commission's denial on March 3, 1971, of WHDH's request that the Commission move for a remand for these reasons. The court was satisfied with the FCC's disposition of the matter and could see no warrant for reopening the case to probe the mental processes of a Commissioner. (Pet. App. H4–H9). No petitioner raises this matter here.

[8] WHDH continues to operate Channel 5 pending final disposition by this Court.

be denied renewal rights (Pet. 20) is without merit. It claims that because it received a four-month license in the initial contest, it is entitled to the significant preference which the Commission gives to ordinary renewal applicants. But the Commission made it very clear that it had never considered WHDH to be an ordinary licensee (Pet. App. 322a–323a). The original grant to WHDH was tainted because of its principal's improper attempt to exert influence on the Commission in behalf of WHDH, which led to "unique events and procedures * * * [placing] WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license" (Pet. App. 323a).

On the unique and special facts of this case, the Commission's treatment of WHDH equally with the other applicants was not only rational, but also consistent with precedent. An analogous case is *WKAT, Inc.* v. *Federal Communications Commission*, 296 F. 2d 375 (C.A.D.C.), certiorari denied, 368 U.S. 841 There, because certain parties had made improper approaches to the Commission, the court of appeals approved a full, comparative hearing without preference for a renewal applicant who, like WHDH, had received a special four-month license.[9] See also *Jacksonville Broadcasting Corp.* v. *Federal Communications Commission*, 348 F. 2d 75 (C.A.D.C.), certiorari

[9] In the *WKAT* case, unlike the case at bar, the licensee seeking renewal of its four-month license had been free of any taint. Yet the Commission, because of the unique circumstances, ordered a full comparative renewal hearing with no preference to the incumbent. *WKAT*, *supra*, at 383.

denied, 382 U.S. 893; *WORZ* v. *Federal Communications Commission*, 345 F. 2d 85 (C.A.D.C.), certiorari denied, 382 U.S. 893. Similarly, the 1970 *Renewal Policy Statement* [10] confers no benefits upon WHDH, for by its terms it applies only to "regular renewal applicants" (Pet. App. 373a); it makes express exception for infrequent cases, such as this, "* * * generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant" (Pet. App. 379a).[11]

WHDH would have the renewal of its license considered as if the original proceeding had been untainted, without regard to the continuing significance of the factors underlying the Commission's decision

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[10] The *Renewal Policy Statement* is at issue in a group of consolidated cases now under submission in the court below *Citizens Communications Center* v. *Honorable Dean Burch*, No. 24,221; *Citizens Communications Center* v. *Federal Communications Commission and United States of America*, No. 24,471; and *Hampton Roads TV Corporation* v. *Federal Communications Commission*, No. 24,491.

[11] Contrary to petitioner's suggestion (Pet. 14), there is nothing in the *Renewal Policy Statement* which limits the "unusual cases" exception to cases in which a court has vacated a Commission award and the Commission has then provided for interim operation by a different party. Rather, the Commission's language makes it clear that, while "generally" these cases will involve court remands, at other times they will not. Nor does it advance petitioner's claim to be a regular renewal applicant that in this case the Commission chose not to vacate the 1962 short-term license and provide for interim operation. Petitioner fails to recognize that the Commission stated that "* * * an interim operation here is inappropriate inasmuch as the further proceedings have run their course with the result that the renewal application of WHDH has been denied, and BBI's application has been granted" (Pet. App. 322a).

to limit the initial grant. But the Commission's powers to remedy "the inroads made by WHDH upon the rules governing fair and orderly adjudication" (Pet. App. 331a; 33 F.C.C. 2d at 454) were not exhausted by the limitation of WHDH to a temporary license. It had a responsibility to the public which, given the unusual history of this case, led it to keep all parties "as close as possible to a new application situation" (Pet. App. 35a). As the court of appeals observed (Pet. App. 35a):

> Hand crafted orders and procedures are particularly appropriate for unique fact situations. On the unique facts presented, WHDH was neither a new applicant nor a renewal applicant as those terms are generally construed. Since these orthodox classifications, and the rules generally pertaining to each, were not meaningfully available to the Commission on these facts, that body soundly formulated an intermediate position for the instant case.

2. WHDH's contention that the court of appeals upheld the Commission's action on grounds not relied on by the Commission (Pet. 21) is without foundation. The court focussed on the principal issue—the Commission's decision to put WHDH's case in a special and unique category because of its past history (Pet. App. 24a)—and it proceeded thoroughly to review that history in order to test the reasonableness of the Commission's action. The court had before it not only the appeals from the renewal proceeding but also the appeals from the remanded initial proceeding, and Choate's misconduct was a factor in the Com-

mission's decision to limit the initial grant to four months and to consider renewal in a comparative hearing in which all applicants were on an equal basis. Thus, while that misconduct was not a factor in the comparative evaluation on renewal, it was nevertheless central to the Commission's disposition of the case as a whole and the court properly considered and upheld the Commission's determinations on this subject (Pet. App. 30a). The court was called upon to do so by WHDH's contention that it was entitled to the preference enjoyed by an ordinary renewal licensee. The court re-examined the entire docket, including the proceeding before the court in 1963 (Pet. App. 27a) and each of the grounds asserted by the Commission for rejecting WHDH. The proceedings relating to the selection of a licensee for Channel 5 have been the subject of a continuous judicial oversight by the court of appeals for more than a decade. This most recent—and perhaps final—opinion reflects a careful and painstaking review in the light of a carefully articulated restatement of the principles which govern judicial review of administrative action (Pet. App. 15a, 22a). No more was required.[12]

3. Charles River, petitioner in No. 1708, argues that the decision of the Commission must be overturned because a quorum of the Commission did not partic-

[12] Petitioner does not challenge here the Commission's judgment that it was deficient in integration and diversification; it has not argued to this Court—or argued seriously to the court below (Pet. App. 23a)—that these deficiencies are insufficient reason to deny its application, so long as the Commission's treatment of it on an equal basis with its competitors was proper.

ipate in the decision—or at least in the comparison between Charles River and BBI—and because even if a quorum did participate the vote of Commissioner Johnson cannot be considered because it was cast simply to produce a working majority for decision. But as the Court below ruled (Pet. App. 39a): "The short answer is that four out of seven Commissioners constitutes a quorum [47 U.S.C. 154(h)]; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present; [citing *WIBC, Inc.* v. *F.C.C.*, 259 F. 2d 941 (C.A.D.C.), certiorari denied, 358 U.S. 920] and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI" (Pet. App. 39a). Cf. *Federal Trade Commission* v. *Flotill Products, Inc.*, 389 U.S. 179.

Commissioner Johnson's vote was not vitiated because it was candidly cast in order to avoid an impasse and to provide an effective order. "That is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality" (Pet. App. 39a). That Commissioner Johnson had no reservations about supporting the majority was made manifest, as the court noted, by his subsequent joining in the denial of Charles River's request for reconsideration (Pet. App. 316a–317a).

Agencies must, of course, give reasons for their determinations (5 U.S.C. 557(c)), and under *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, those reasons form the basis for judicial review of their action. But neither the requirement for

findings nor the "limited office" [13] of the *Chenery* principle prevents individual commissioners from casting their votes in favor of an articulated decision so as to make it possible for the agency to function.

4. Charles River also contends (Pet. 15–17) that the comparison between it and BBI was flawed in the weighing process. The Commission gave BBI a slight demerit on the ground that its programming proposals seemed exaggerated, yet gave BBI a strong preference on the important management-ownership integration factor. Charles River appears to contend that the basis for BBI's representations concerning its program plans was found to be inherently incredible and that the integration criterion is therefore meaningless because it is concerned only with the liklihood of effectuation of the proposed programming.

This contention misconceives the basis for the demerit. The good faith and reliability of the overall BBI program proposal were never in doubt; indeed the Commission specifically rejected a finding by the hearing examiner that the BBI local live program proposal "was flashed for its supposed value in a comparison" (Pet. App. 73a, exception 138; Pet. App. 288). The Commission concluded only that the record did not offer sufficient support for a rather ambitious undertaking in the area of local live programs and that a demerit in this area, cancelled out by a similar demerit to petitioner, precluded favoring either applicant on the basis of proposed programs. Evaluation of such matters is peculiarly a task for the Com-

[13] See *Penn-Central Merger Cases*, 389 U.S. 486, 519, n. 10.

mission, when, as here, its reasoning is indicated with clarity and its findings supported by the evidence (Pet. App. 40a–43a). See *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229; *WEBR, Inc.* v. *Federal Communications Commission*, 420 F.2d 158 (C.A.D.C.).

5. Petitioner Greater Boston, an unsuccessful applicant in the original comparative proceeding which culminated in the four-month WHDH grant, contends in No. 1716 that the entire renewal proceeding should never have been held because WHDH's original application should have been denied outright rather than granted for a four-month period. It argues that the court below has never passed on the appeal it brought from that award and that the case should be remanded for this purpose. But the court below did give full consideration to the claims of Greater Boston. Its opinion expressly states that the court had "reexamined the Commission docket that was before us in 1963 when we remanded for further proceedings" (Pet. App. 27a) and concluded that "the Commission stayed within the range of sound discretion" in awarding WHDH its four-month license (Pet. App. 30a). The Court noted that Greater Boston's contention before the Commission that WHDH should have been disqualified represented the opposite extreme from WHDH's contention that it should have received a regular full term license in 1962, and it found reasonable the Commission's selection of an approach "in between these extremes" (Pet. App. 32a). Greater Boston was free to par-

ticipate in the comparative renewal proceeding, and a majority of its stockholders did so in reorganized form, as Greater Boston TV Co., Inc. (see p. 6, *supra*). Noting the successor relationship between the two firms, the court stated "we see no grounds for concluding that this appellant had a right to confine the Commission to consideration on the basis of the original record and to resist a fresh, comparative hearing" (Pet. App. 43a, fn. 44).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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